MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 706B** **RULING** **Mr. bin 'Atash's Motion to Compel Discovery Regarding Denial of Important Role in al Qaeda** **16 April 2020**

1. **Procedural History**. On 28 January 2020, Counsel for Mr. bin 'Attash moved[1] the Commission to compel the production of discovery related to "the facts and circumstances pertaining to Mr. bin 'Attash's exculpatory statements made early on in his captivity wherein he denied playing an important role within al Qaeda."[2] On 30 January 2020, the Government responded[3] in opposition. The Defense did not submit a reply.

2. **Findings of Fact**. For the purposes of this motion, the Commission finds the following:

a. After his capture in April 2003, Mr. bin 'Attash was transferred to the custody of the United States and held in Central Intelligence Agency (CIA) "black sites" as part of the CIA's former Rendition, Detention, and Interrogation (RDI) Program until he was transferred to U.S. Naval Station Guantanamo Bay, Cuba, in September 2006. Between 2003 and 2006, Mr. bin 'Attash was repeatedly interrogated regarding his involvement in al Qaeda and his alleged role in the 9/11 attacks. As the Government has previously conceded, Mr. bin 'Attash's time in the RDI Program "resulted in, by design, a degree of coercion inherent in the production

[1] AE 706 (WBA), Mr. bin 'Attash's Motion to Compel Discovery Regarding Denial of Important Role in al Qaeda, filed 28 January 2020.
[2] *Id*. at p. 1.
[3] AE 706A (GOV), Government Response To Motion to Compel Discovery Regarding Denial of Important Role in al Qaeda, filed 30 January 2020.

of any statements he may have made during that period that renders such statements inadmissible."[4]

b. Mr. bin 'Attash was interrogated again in 2007 and 2008 by Special Agents of the Federal Bureau of Investigation (FBI) and the Criminal Investigation Task Force (CITF). The Government has signaled their intent to introduce into evidence at trial incriminating statements made by Mr. bin 'Attash during the FBI/CITF interrogations, arguing that incriminating statements made by Mr. bin 'Attash during those interrogations were made voluntarily. In support of their position that Mr. bin 'Attash's statements to the FBI were made voluntarily, the Government has advanced a theory that Mr. bin 'Attash made incriminating statements to FBI agents, not because of coercion inherent in his CIA detention and interrogation, but in part because he wished to "proudly and unabashedly proclaim" responsibility for the 9/11 attacks.[5] The Prosecution has similarly advanced the argument that Mr. bin 'Attash has "never once denied"[6] the truth, that is, his role in the 9/11 attacks.

c. As revealed in an interrogation record disclosed in a Commission approved summarized form to the Defense through the Military Commission Rule of Evidence (M.C.R.E.) 505 process, during interrogations conducted by the CIA in mid-2003, Mr. bin 'Attash made at least one statement denying that he played an important role in al Qaeda. The same record hints at the use by the CIA of sleep deprivation leading up to the statement in question.[7]

d. The Commission further finds as fact those facts asserted in paragraphs 4.h. and 4.i. of the motion to compel discovery.

[4] *See* AE 631M (GOV), Government Response to Mr. bin 'Attash's Motion to Suppress Purported Statements as Involuntary, filed 1 November 2019 at p. 2.
[5] *Id*. at p. 28.
[6] *Id*. at p. 79.
[7] *See* AE 706 (WBA), Attach. B.

3. **Burden of Proof**. As the moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.[8]

4. **Oral Argument**. The Defense requested oral argument on the motion. The Government suggests that oral argument is unnecessary. In accordance with Rule for Military Commission (R.M.C.) 905(h), "[t]he military judge may, in the judge's discretion, grant the request of either party . . . to present oral argument." In this instance, the issue has been fully briefed in the written pleadings. Oral argument is not necessary to the Commission's consideration of the issues presented.[9] The Defense request for oral argument is **DENIED**.

5. **Law - Discovery**.

a. Information is discoverable if it is material to the preparation of the defense or exculpatory.[10] Information is also discoverable if it is material to sentencing.[11] The materiality standard is not normally a heavy burden. Evidence is material if there is a strong indication the information will "play an important role in uncovering admissible evidence, aiding in witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[12]

b. A "mere conclusory allegation that the requested information is material to the preparation of the defense," however, does not satisfy the Defense's burden to show "the reasonableness and materiality of the request."[13] Similarly, a "vague asserted need for potentially

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[8] Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).
[9] *See also* Military Commissions Trial Judiciary Rules of Court 3.5.m. (1 September 2016).
[10] R.M.C. 701(c)(1-3), (e); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Furthermore, "[u]nder *Brady*, . . . prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, . . . and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" *United States v. Safavian*, 233 F.R.D. 12, 17 (D.D.C. 2005). Note, however, that absent "a specific request . . . that . . . explicitly identifies the desired material and is objectively limited in scope," there is no obligation for "prosecutors to search . . . unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).
[11] R.M.C. 701(e)(3).
[12] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).
[13] *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970), *cert. denied*, 400 U.S. 958 (1970).

exculpatory evidence that might be contained" in the materials sought "does not pass muster."[14] Regarding classified information specifically, the Court of Appeals for the District of Columbia Circuit has held that classified information "is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but . . . further requires that a defendant seeking classified information . . . is entitled only to information that is at least helpful to the defense of the accused."[15] Furthermore, the Defense must be able to sufficiently establish that the material sought in fact exists.[16] Finally, a Defense discovery request that is overbroad or otherwise objectionable may simply be denied; the Commission is under no obligation to amend or modify the request to render it unobjectionable.[17]

c. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.[18] Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance."[19] It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.[20]

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[14] *United States v. Apodaca*, 287 F. Supp. 3d 21, 40 (D.D.C. 2017).
[15] *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)).
[16] *United States v. Norwood*, 79 M.J. 644, 666 (N-M.Ct. Crim. App. 2019), review granted on other grounds, No. 20-0006/NA, 2020 WL 710633 (C.A.A.F. Jan. 21, 2020) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)).
[17] *See*, *e.g.*, *Benham v. Rice*, 238 F.R.D. 15, 19 (D.D.C. 2006), on reconsideration in part, No. CIV.A. 03-01127, 2007 WL 8042488 (D.D.C. Sept. 14, 2007)("[I]t is not the court's function to modify plaintiff's demands so that, as revised, they are reasonable and legitimate." *Id.*) (interrogatories in civil case).
[18] R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).
[19] *Ritchie*, 480 U.S. at 59.
[20] *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge's dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015) (same).

6. **Conclusions of Law**.

a. In DR-377-WBA,[21] the underlying discovery request at issue, Mr. bin 'Attash points to a specific document provided in discovery (MEA-STA-00004374), which references a mid-2003 interrogation, where Mr. bin 'Attash denied playing an important role in al Qaeda. The Defense argues that denials by Mr. bin 'Attash of any key role in al Qaeda or the 9/11 attacks, such as the denial recorded in MEA-STA-00004374, undermines any Government argument that Mr. bin 'Attash later confessed to FBI agents in 2007 because he was eager or proud to claim responsibility, as suggested by the Government. In this motion, as in the underlying discovery request, Mr. bin 'Attash makes eight requests for additional discovery:

1) The date and time that this statement was made.

2) All standard and enhanced interrogation techniques (collectively constituting torture techniques) used on Mr. bin 'Attash from his capture until this statement(s) was given.

3) All torture techniques used on Mr. bin 'Attash between this statement and following statements regarding this topic.

4) The length of sleep deprivation prior to being allowed to sleep leading into giving this statement.

5) The amount of sleep Mr. bin 'Attash was permitted prior to giving this statement.

6) The full series of questions and answers that led to Mr. bin 'Attash's denial of playing an important role in al Qaeda.

7) All cables, reports, correspondence, and other memorialization of or regarding Mr. bin 'Attash's aforementioned statement.

8) All previous or follow-up statements about or regarding the topic of Mr. bin 'Attash's involvement in al Qaeda. Insofar as they have already been provided, Mr. bin 'Attash requests that these statements be identified and the foregoing information be provided for them as well.

[21] *See* AE 706 (WBA), Attach. E.

b. In their response to the motion, the Government advances several arguments. First, the Government seems to suggest that the information related to the statement contained in MEA-STA-00004374 is not discoverable because "such self-serving statements would be inadmissible hearsay should the Accused attempt to use them."[22] This argument can easily be dismissed since, regardless of the question of the admissibility of such a statement during the findings portion of trial, such a statement, as well as the timeframe the statement was given, could certainly be relevant for the purposes of a motion to suppress statements subsequently made by Mr. bin 'Attash to FBI agents.

c. The Government's primary argument, however, citing 10 U.S.C. § 949p-4(c), is that the Defense motion amounts to an improper motion for reconsideration of this Commission's previous approval of summaries and substitutions proposed by the Government through the M.C.R.E. 505 process. While the Military Commissions Act of 2009 does bar motions for reconsideration of orders by this Commission approving summaries or substitutions of classified information issued pursuant to M.C.R.E. 505, this Commission has previously determined that "[t]he Commission can, either *sua sponte* or upon a motion to compel discovery, review the summarized information, to determine if additional information should be added to the summary in order to provide Defense with sufficient information to give it 'substantially the same ability to make a defense as would discovery of or access to the specific classified information.'"[23] In addition, in AE 397F,[24] the Commission, while adopting the ten categories of discovery proposed by the Government, ruled that "[a]s necessary the Commission will entertain motions

[22] AE 706A (GOV) at p. 4.
[23] AE 164C Order, Defense Motion to Stay all Review Under 10 U.S.C. § 949p-4 and to Declare 10 U.S.C. § 949p-4(c) and M.C.R.E. 505(f)(3) Unconstitutional and in Violation of UCMJ and Geneva Conventions, dated 16 December 2013 at p. 3.
[24] AE 397F Trial Conduct Order, Government Proposed Consolidation of Motions to Compel Information Related to the CIA's Former Rendition, Detention, and Interrogation Program, dated 5 April 2016.

for further discovery after the Defense has received, and had an opportunity to assimilate, what has been or is being provided at this time."[25] In light of those previous rulings, the Commission does not consider this Defense motion to be an improper request for reconsideration, but rather an additional or expanded request for discovery based upon discovery that has already been produced through the M.C.R.E. 505 process.

d. Finally, the Government suggests that "the Defense possesses all non-cumulative, relevant, and helpful information regarding, the Accused's statements while in the RDI program; all applications of enhanced interrogation techniques against the Accused; and an index delineating a chronological timeline of all RDI discovery provided."[26] Having reviewed Attachment B to AE 773A (GOV),[27] the Commission is satisfied with the approach adopted by the Government, wherein the Government has provided the Defense spreadsheets or indices that clearly identify specific dates associated with Bates-stamped discovery provided to the Defense.[28] In their response to the instant motion, however, the Government merely implies that they have provided similar data with respect to Mr. bin 'Attash. However, the Government did not attach to its response any spreadsheet or index that would show that the Government has provided the date of the statement memorialized in MEA-STA-00004374. Nor did the Government affirmatively state that they have turned over the date in question.

e. While the Commission acknowledges that the interrogation report identified as MEA-STA-00004374 indicates that the statement in issue was made by Mr. bin 'Attash in "mid 2003,"

[25] AE 397F at p. 3.
[26] AE 706A (GOV) at p. 6.
[27] AE 773A (GOV), Government Response To Mr. Mohammad's Motion to Compel Documents Underlying the 9/11 Commission Report, filed 1 April 2020.
[28] The Commission also notes the specific dates and times the Government added to summaries previously provided to the Defense regarding enhanced interrogation techniques against Mr. bin 'Attash from 21-23 July 2003 in AE 696A (GOV), Government Response to Mr. bin 'Attash's Motion to Compel Material and Information Pertaining to the Government's Use of Forced Sleep Deprivation Against Mr. bin 'Attash, filed 27 January 2020.

in light of the argument for materiality advanced by the Defense, the Commission finds that the specific date of that statement is relevant and material to the preparation of the Defense.

f. With respect to the categories of discovery identified in paragraphs 3.b.-3.h. of DR-377-WBA,[29] the Commission finds that those categories of discovery generally fall within the ten-category construct established in AE 397F, that the requested categories of discovery are material to the preparation of the Defense, and that the requested materials, if they exist, should have previously been provided in discovery, subject to the application of M.C.R.E. 505. The Commission also suspects that the requests for information in DR-377-WBA are redundant with prior discovery requests and orders or rulings issued by this Commission. The Government has represented in their response that the Defense is in possession of "all non-cumulative, relevant, and helpful information regarding, the Accused's statements while in the RDI program; all applications of enhanced interrogation techniques against the Accused; and an index delineating a chronological timeline of all RDI discovery provided."[30] Mr. bin 'Attash did not reply to the Government's response and has not specifically refuted this claim by the Government as it pertains to the discovery issue in dispute in this motion. The Commission has no specific reason to question the Government's representation that they have complied with their discovery obligations. If the Government has turned over to the Defense any documents in its possession or control that fall into the categories identified by the Defense in their motion to compel discovery, the Commission finds that no additional relief is warranted at this time.

g. With respect to the additional request in paragraph 3.h. of DR-377-WBA, that the Government identify for the Defense any statement by Mr. bin 'Attash that was previously turned over in discovery, the Commission will order the Government to identify this previously

[29] *See* AE 706 (WBA), Attach. E.
[30] AE 706A (GOV) at p. 6.

provided discovery by Bates number to Counsel for Mr. bin ‘Attash if it has not already done so. As for the additional request for the dates for all other statements made by Mr. bin ‘Attash, the Government asserts that these dates have been provided via an index delineating a chronological timeline for all RDI discovery provided. The Commission will not, at this time, order the Government to revisit all discovery previously turned over to the Defense for the purpose of providing dates associated with each document turned over in discovery. If, however, the Defense is able to demonstrate that the actual date (of a specific document or series of documents provided in discovery is relevant and material to some specific issue in this case, the Government will be expected to provide that information in some meaningful form, subject to any Government claim of privilege with respect to that information.

7. **Ruling**. The motion to compel discovery is **GRANTED in part** and **DENIED in part** as set forth herein.

8. **Order**.

a. The Government is ordered to disclose the specific date of the statement identified in MEA-STA-00004374 to the Defense, subject to any additional claim of privilege by the United States. The Government may disclose the information in question through the use of an appropriate spreadsheet or index, consistent with that contained in AE 773 (GOV), Attachment B, or by some other appropriate means. To the extent that the Government has previously provided the Defense a spreadsheet or index clearly setting forth the date in question, the Commission orders no additional relief at this time.

b. With respect to the information generally requested in paragraphs 3.b.-h., the Government is directed to disclose the information requested therein to the Defense, (subject to the limitations set forth in paragraph 6.g. of this ruling) if such information exists and if such information has not already been turned over in discovery, subject to any claim of privilege by

the United States. If the Government has previously complied with this order, no additional relief is directed at this time.

So **ORDERED** this 16th day of April, 2020.

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W. SHANE COHEN, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary